IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 1-3-2002

CORAM:

THE HON'BLE MR. JUSTICE K. SAMPATH

S.A.No.1786 of 1989

1. Narayanan
2. Muthulakshmi
3. Vaiyapuri ... Appellants

Vs.

1. Ponnammal
2. Muthukirishnan ... Respondents

For Appellants: ... Mr.T.M. Hariharan
For Respondents: ... No Appearance

This second appeal is filed against the judgment and decree dated 2 8-6-1989 made in A.S.No.8/89 on the file of the learned First Additional District Judge, Tiruchirapalli.

: JUDGMENT

Defendants 2 to 4 in O.S.No.38/87 on the file of the learned District Munsif, Manapparai, are the appellants in the second appeal. The first respondent herein filed the suit for partition and separate possession of one fourth share in the suit property alleging as follows:
The suit property belonged to one Kondappa Naicker. She was his first wife. Defendants 1 to 3 were his sons through his second wife Venkittammal. The fourth defendant was the third defendant's husband. Kondappa Naicker passed away on 21-9-1981 in a road accident. As heirs of Kondappa Naicker, herself and defendants 1 to 3 were enjoying the suit property. The fourth defendant had executed a lease deed in respect of the suit property. He had filed a suit in O.S.No.200/86 and obtained an injunction restraining the defendants therein from interfering with his possession and enjoyment. Since defendants 1 to 3 did not concede her demand, the suit came to be filed.

2. The first defendant remained exparte. The third defendant filed a written statement and the same was adopted by defendants 2 and 4. Her written statement was to the following effect:

3. The plaintiff was not Kondappa Naicker's first wife. His first wife's name was Pichaiammal. Pichaiammal died issueless. Kondappa Naicker therefore married Venkittammal as his second wife and defendants 1 to 3 were born to her. Kondappa Naicker died about 20 years prior to the suit. The plaintiff was not entitled to any share as she was not his first wife. It was false to say that she was also in joint enjoyment of the suit property along with defendants 1 to 3. The fourth defendant was a cultivating tenant, his name having been entered in the Record under Act 10 of 1969. Even conceding that the plaintiff was Kondappa Naicker's wife, she would be entitled to only 1/12 th share and not 1/4th share.

4. The trial Court framed the necessary issues and on the pleadings and on the oral and the documentary evidence, held that the plaintiff was Kondappa Naicker's wife, that she was entitled to 1/4th share and so holding by judgment and decree dated 14-3-1988 passed a preliminary decree for partition.

5. The other suit filed by the fourth defendant, viz. O.S.No.200/86 was also tried along with the suit O.S.No.38/87 and the trial Court granted a qualified injunction stating that till a Commissioner was appointed and the share of the plaintiff in O.S.No.38/87 was decided and possession actually given, there would be an injunction in favour of the plaintiff in O.S.No.200/86 (4th defendant in the present suit). Only against O.S.No.38/87, defendants 2 to 4 filed appeal A.S.No.8 /89 before the First Additional District Judge, Tiruchirapalli, contending that the trial Court erred in holding that the plaintiff was the legally wedded wife of Kondappa Naicker, that the trial Court ought to have held that the properties were the joint family properties and that the plaintiff was not entitled to any share. The learned District Judge dismissed the appeal filed by defendants 2 to 4 by judgment and decree dated 28.6.1989. It is as against that, the present second appeal has been filed.

6. At the time of admission, the following substantial questions of law were framed for decision in the second appeal:

"1. Whether on the finding of the Courts below regarding the character of the properties and the relationship of the parties to the decree for partition of a fourth share in favour of the plaintiff is legal and proper?; and

2.Whether the plantiff could get separate possession of her share de hors the rights of the fourth defendant as cultivating tenant?"

7. Mr.T.M. Hariharan, learned Counsel for the appellants, contended that the plaintiff if at all could claim only an

1/12th share and the Courts below were in error in holding that she would be entitled to 1/4th share. In this connection, the learned Counsel submitted that while the trial Court held the suit property to be the separate property of Kondappa Naicker, the lower Appellate Court rejected the case of defendants 2 and 3 and held that the suit property was joint family property and that the plaintiff would be entitled to 1/4th share by relying on the decisions of the Supreme Court which had been rendered in respect of Dayabhaga School of Inheritance and Mitakshara Maharashtra School of Inheritance, the principles in respect of which were totally inapplicable to the case on hand, the parties being governed by Mitakshara Madras School of Inheritance.

8. In this connection, the learned Counsel referred to the Commentaries of Hindu Law by Mulla and Mayne and also the following decisions:

1. SUBRAMANIAN CHETTY VS. ARUNACHALAM CHETTY (1905 ILR 28 Madras 1)
2. AUDEMMA VS. VARAD REDDY (AIR 1949 Madras 31 = 1948-1 MLJ 30) and
3. ADUSUMILLI SEETHAMAHALAKSHMAMMA (AIR 1974 Andhra Pradesh 130 FB).

9. The facts not in dispute and cannot be disputed are:
The plaintiff was the legally wedded wife of Kondappa Naicker. Kondappa Naicker died in 1981 leaving behind properties belonging to the joint family. The plaintiff was entitled to a share. What we have to do is to quantify the share of the plaintiff. The lower Appellate Court has relied on the judgments of the Supreme Court in GURUPAD KHANDAPPA MAGDUM VS. HIRABAI KHANDAPPA MAGDUM (AIR 1978 SC 1239 = 1978-3 SCC 383) and RAJ RANI VS. CHIEF SETTLEMENT COMMISSIONER, DELHI AND OTHERS (AIR 1 984 SC 1234 = 1984-3 SCC 619) for coming to the conclusion that the plaintiff would be entitled to 5/16th share and in as much as she had claimed only 1/4th share, the decision by the trial Court giving her 1/4th share could not be interfered with. The learned Judge also distinguished the Full Bench decision of the Andhra Pradesh High Court stating that the decision of the Supreme Court would be binding on him and the decisions of this Court referred to in the judgment of the Andhra Pradesh High Court in A. SEETHAMAHALAKSHAMMA VS. Y. CHOLAMAIAH (AIR 1974 Andhra Pradesh 130 FB) had not been brought to the notice of the Supreme Court when it decided the cases in GURUPAD KHANDAPPA MAGDUM VS.HIRAIBAI KHANDAPPA MAGDUM AND OTHERS and RAJ RANI VS. THE CHIEF SETTLEMENT COMMISSIONER, DELHI AND OTHERS.

10. The passage from the Hindu Law by Mulla, in this connection, would be relevant. In Mulla Hindu Law 16th Edition, Section 315 it is stated as follows:
"A wife cannot herself demand a partition, but if a partition does take place between her husband and his sons, she is entitled (except in Southern India) to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband."

The learned Author has referred to SUBRAMANIAN VS. ARUNACHALAM (1905-28 Madras 1, at page 8) and A. SEETHAMAHALASHAMMA VS. Y. CHOLAMAIAH (AIR 1974 Andhra Pradesh 130 FB) and observed that in Southern India the practice of allotting shares upon partition to females has long since become obsolete.

11. Again, in the same COMMENTARY under Section 6 of the Hindu Succession Act under illustrations this is what is stated:
"Illustration (n): A and his sons, B and C, are members of a Mitakshara coparcenary. A dies intestate in 1958 leaving him surviving his widow A1 and his two sons, B and C continued to be members of the joint family. A's undivided interest in the coparcenary property will not devolve by survivorship upon B and C, but will devolve by succession upon A1, B and C and their shares in it will be equal in accordance with the rules laid down in Sections 8, 9 and 10. The position will be similar if in addition to B and C the deceased has left him surviving a daughter or a predeceased daughter's son or any other female relative specified in Class I of the Schedule of heirs. Such other relative for instance may be mother, daughter of a predeceased daughter or daughter of a predeceased son."
12. In Illustration 1 under Section 6 of the Hindu Succession Act it is stated as follows:
"In illustration (n) above, it is stated that A's undivided interest will devolve by succession upon his widow A1 and his two sons B and C. That share of A will have to be computed according to the law of partition applicable to the parties on the date of A's death. If a partition had in fact taken place immediately before his death, A in all States except Madras, would have been entitled to ¼ of the property since A1 the wife would have become entitled to receive a share equal to that of a son and the property would have been divided in four parts. That ¼ interest of A will therefore devolve by succession upon A1, B and C. In all States other than Madras A1 will become entitled to 1/12 of the entire coparcenary property as one of the heirs of A in addition to the ¼ share as laid down in the Supreme Court decision in GURUPAD's case (supra) in the facts and circumstances of that case. In Madras the wife does not get any share on a partition between her husband and her sons. So on the death of A she will be entitled to 1/9 only of the entire property because on partition A's share would have been 1/3rd and 1/4th of the property (by virtue of the proviso)."

13. To the same effect is the Commentary by Mayne on Hindu Law. Commentators Raghavachari and Duncan M. Derrett have also observed that "in Southern India, the rules of the Mitakshara law upon partition to wives, widows, mothers and grandmothers have long since become obsolete owing to the influence of the SMRITI CHANDRIKA and THE SARASWATI VILAS which follows it and Aparaka."

14. A Full Bench of the Andhra Pradesh High Court in ADUSUMILLI SEETHAMAHALAKSHMAMMA VS. YERNENI CHALAMAIAH AND OTHERS (AIR 1974 Andhra Pradesh 130), after a thorough reference to what is contained in SMRUTI CHANDRIKA and SARASWATI VILAS, deduced the following as the

principles relating to succession of the right of a widow in the property of coparcener husband.

1. Mother or wife is not a coparcener.
2. Mother or wife has no right to demand a partition.
3. Partition can be at the father's or husband's desire not at the desire of the mother or the wife. In such a case, if the father or husband makes the share equal, then the mother or wife would be a partaker of equal share. This is subject to the condition that she has not been given property by her husband or father-in-law. If she has enough, then she would not get any allotment of the property to her.
4. More or less the same rule applies if a partition between sons takes place after the death of the father.
5. If the word `amsa' appearing in the Mitakshara is understood to mean `portion' and not `share' as is understood by SMRUTI CHANDRIKA and SARASWATI VILAS, then there would be no conflict between these three texts. Upto this point, there is thus unanimity amongst all the three text writers. Since the Mitakshara is silent on some of the aspects, the following appear prominently in the SARASWATI VILAS, but it logically flows from the text of Mitakshara.
6. If the mother or the wife has her own property, then she will get only a proportionate share, but in no case more than what the son gets.
7. The portion allotted to the mother or wife is for her maintenance and for performance of such religious rites as require property. Thus there is no distinct establishment of a mother's division of heritage, but only a taking of such substance as she requires for the said purpose."

15. The Full Bench has referred to a number of earlier decisions of this Court starting from RAMAPPA NAICKEN VS. SITHAMMAL (1878 ILR 2 Madras 182) to AUDEMMA VS. VARADA REDDY (AIR 1949 Madras 31). It is not necessary to refer to what has been laid down in each of those decisions. Suffice it to refer to only the Full Bench decision in AUDEMMA VS. VARADA REDDY (AIR 1949 Madras 31) wherein it has been said:

"It may be pointed out that at one time under the law of the Mitakshara Hindu mother was, at the partition of coparcenery property, entitled to be allotted a share equal to that of her son or step-son, and that the practice of allotting shares upon partition to females has long since become obsolete in Southern India and that the right survives only as a right for provision of maintenance which must not in any case exceed the share of her son."

16. The Full Bench has clearly distinguished the unreported decision of the Supreme Court in Civil Appeal No.1048/67 dated 16-3-1970 SC) and held that the said decision related to succession under Dayabhaga or Mitakshara as obtained in Maharashtra. The Supreme Court did not have occasion to consider the position prevailing in Madras at any point of time.

17. The decisions of the Supreme Court, viz.
1. GURUPAD KHANDAPPA MAGDUM VS. HIRABAI KHANDAPPA MAGDUM (AIR 1978 SC

1239 = 1978-3 SCC 383),
2. RAJ RANI VS. CHIEF SETTLEMENT COMMISSIONER, DELHI (AIR 1984 SC 123 4 = 1984-3 SCC 619) (both arose not under Madras Mitakshara law) and
3. STATE OF MAHARASHTRA VS. NARAYAN RAO SHAM RAO DESHMUKH AND OTHERS (AIR 1985 SC 716 = 1985-2 SCC 321)
are subsequent to the decision of the Andhra Pradesh Full Bench.
18. The first of the decisions `GURUPAD's case went from Bombay and the Supreme Court applied the law obtained in the Bombay School to the facts of that case. The second decision in RAJ RANI ETC. (AIR 19 84 SC 1234) went from the Delhi High Court and the Supreme Court has considered the law obtaining in Delhi. The third case also went from Maharashtra. It followed the earlier decision in GURUPAD's case (AIR 1978 SC 1239).

19. No doubt, in those decisions it has been held that the widow would be treated as one of the sharers and she would get an equal share. But that is not the law applicable to Madras School of Mitakshara Law. I am in entire agreement with the view expressed by the Andhra Pradesh Full Bench in ADUSUMILLI SEETHAMAHALAKSHMAMMA's case (AIR 197 4 Andhra Pradesh 130) and I respectfully follow the same.
20. When the decisions of the Supreme Court referred to supra do not apply to the cases arising under Mitakshara law in Madras, the learned District Judge was in error in applying the ratio in those decisions to the case on hand. Consequently, the allotment of 1/4th share to the plaintiff in the joint family properties cannot be sustained. She will get only an 1/4th share in the husband's 1/3rd share, which will be 1/12.
21. Consequently, the judgment and the decree of the learned District Munsif, Manapparai, in O.S.No.38/87 as confirmed in A.S.No.8/89 by the learned First Additional District Judge, Tiruchirappalli, will stand modified and instead of 1/4th share, it is declared that the plaintiff would be entitled to 1/12th share. In other respects the decision of the Courts below will stand. The second appeal is disposed of accordingly. There will be no order as to costs.
1-3-2002
Index: Yes
IGP

To
1. The First Additional District Judge,
Tiruchirappalli (with records).
2. The District Munsif,
Manapparai.
3. The Record Keeper, V.R. Section,]
High Court, Madras.

K. SAMPATH, J.

Judgment
in
S.A.No.1786 of 1989

1-3-2002

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